IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-396

ROBERT E. WRIGHT, SR.,
Petitioner,

versus

SOUTHWESTERN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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ROBERT E. WRIGHT, SR.,
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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

Robert E. Wright, Sr. prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeal for the Fifth Circuit entered in the above case on July 14, 1976, with Application for Rehearing being denied on August 18, 1976.

OPINIONS BELOW

The original opinion of the District Court, rendered under Docket Number 17,451, with Reasons for Judgment being rendered and Judgment being signed on November 14, 1975, copy of which Reasons and Judgment are attached hereto and made a part hereof and

are appended to this petition in the appendix at page numbers 1a-7a and are reported at ____ F. Supp. ____.

The matter was placed on the summary docket of the United States Court of Appeals for the Fifth Circuit as Number 76-1092 and the decision of the District Court was affirmed on July 14, 1976, as per copy of same attached hereto and made a part hereof, and appended to this petition in the appendix at page numbers 7a-8a. Robert E. Wright, Sr.'s application for rehearing to the Fifth Circuit was denied on August 18, 1976, as per copy attached hereto and appended to this petition in the appendix at page numbers 8a-9a.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on July 14th, 1976, and Robert E. Wright, Sr.'s Application for Rehearing was denied by the Court of Appeals for the said Circuit on August 18, 1976. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The instant action seeks to enforce an agency contract to sell insurance of a specified type providing for renewal commissions even after termination. The case involves an interpretation of the agency contract regarding obligations of the insurance company with respect to renewal commissions, the interpretation of which will have far-reaching affects upon the insurance industry of the United States. The following questions are presented to this Honorable Court:

1. Is a conversion of 396 individual tax-sheltered annuity plans to group professional annuity plans, having no reported Internal Revenue tax consequences an actual termination of individual insurance policies or is it merely a continuation of the individual annuity plans under a different name?

2. Under the language of the agency contract between insurance agent and insurance company, can the insurance company avoid its obligations to pay renewal commissions by converting individual tax sheltered annuity plans to group professional annuity plans?

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. Section 401. Qualified Pension, Profit Sharing and Stock Bonus Plans.

(g) Annuity defined — For purposes of this section and Sections 402, 403, and 404, the term "annuity" includes a face-amount certificate, as defined in Section 2 (a) (15) of the Investment Company Act of 1940 (15 U.S.C., Sec. 80 a-2); but does not include any contract or certificate issued after December 31, 1962, which is transferrable, if any person other than the trustee of a trust described in Section 401 (a) which is exempt from tax under Section 501 (a) is the owner of such contract or certificate.

STATEMENT OF THE CASE

Plaintiff seeks compensation relief for deprivation of renewal commissions due from the individual annuity contracts sold previous to termination of agency contract between plaintiff and defendant. Plaintiff began employment with defendant-insurance company in 1955 selling life insurance. The pertinent part of the agency contract read as follows:

> "6. Service commissions shall be allowed and paid only during the continuance in force of this contract, except:
>
> (a) If this contract is terminated by the death or, in the sole judgment of the company, the physical or mental disability of the second party, then the service commissions from which second party shall have heretofore qualified shall continue to be paid as they accrue to second party or to his legal representatives, as provided in this contract; and
>
> (b) If this contract is terminated by either party after it shall have been in force for three or more consecutive contract years of twelve months each, for any reason other than the death or disability of the second party or the breach of its provisions by second party, then the service commissions for which second party shall have heretofore qualified, less

> a collection fee of 1% of the premiums on which such commissions are payable, will continue to be paid as they accrue to second party, or to his legal representatives, until the number of policy years for which such service commissions are paid on account of business produced during any contract year, including those years and parts of years for which service commissions were paid prior to the termination of the contract, shall equal respectively the number of whole years of twelve months each that this contract shall have been continuously in force; subject always to the limitation, however, that in no event shall the number of policy years for which service commissions are paid on account of any such business exceed the number provided in the provisions governing service commissions contained in Section 4 of this contract."

Injuries limited plaintiff, Wright's, ability to canvass for life insurance. After Congress passed the Technical Amendments Act of 1958, plaintiff began to develop individual annuity programs. Plaintiff personally worked and obtained tax-sheltered annuity plans (TSAP) franchises for defendant-Southwestern Life Insurance Company, among some ten higher learning institutions in Louisiana. Plaintiff continued to sell TSAP's to individuals and serviced them until

April 17, 1968, when he was fired by defendant-insurance company. Having been fired, the plaintiff's renewal commissions on policies sold by him and due to him as per contract acquired as a vested interest suddenly began to stop. The defendant-insurance company had begun a campaign to convert all individual annuity plans to group annuity plans. Insurance company claimed that the individual TSAP plans were terminated and thus renewal commissions were no longer due to fired agent Wright. However, the insurance company continued to pay renewal commissions on individual TSAP policies even after conversion to group professional annuity (GPA-70) policies to agents still employed by the insurance company.

Plaintiff sought to have defendant-insurance company pay his vested renewal commissions as per agency agreement between the parties. Plaintiff instituted suit in the United States District Court for the Western District of Louisiana, Monroe Division, with jurisdiction under 28 U.S.C. Section 1332, and the Constitution and the laws of the United States, the parties being citizens of different states and the amounts in controversy exceeding $10,000.00. At the conclusion of plaintiff's evidence, the defendant moved for "directed verdict". The Honorable District Judge treated the motion as a Motion to Dismiss and the Court granted judgment for defendant, dismissing plaintiff's complaint. From said Judgment of the District Court Robert E. Wright, Sr. perfected an appeal to the United States Court of Appeal for the Fifth Circuit. The instant matter was placed on the summary docket of the United States Court of Appeal for the Fifth Circuit, under docket number 76-1092. On July 14, 1976, judgment was rendered affirming the decision of the

District Court. Robert E. Wright, Sr. timely asked for rehearing in this matter and said Application for Rehearing was denied on August 18, 1976.

REASONS FOR GRANTING THE WRIT

By affirming, without written reasons, the Judgment of the District Court in this matter, the United States Court of Appeals for the Fifth Circuit rendered a decision which will have far reaching effects in the insurance industry of these United States. We will now discuss each of the questions presented to this Honorable Court in the numerical order set out hereinabove.

ARGUMENT

Question 1: "Is A Conversion Of 396 Individual Tax-sheltered Annuity Plans To Group Professional Annuity Plans Having No Reported Internal Revenue Tax Consequences, An Actual Termination Of Individual Insurance Policies Or It Is Merely A Continuation Of The Individual Annuity Plans Under A Different Name?"

Petitioner, Robert E. Wright, Sr., presented evidence to show that the 396 individual tax-sheltered annuity plans written by agent Wright were converted to group professional annuity plans without any Internal Revenue tax consequences at all. Under Section 401 of the Internal Revenue Code a transferrable annuity was at the time of the conversion by the insurance company excluded from deferred taxation provisions. An annuity that is terminated is also sub-

ject to taxation at that point. It follows that if the TSAP plans written by agent Wright were terminated or transferred then taxation should have occurred. Defendant-insurance company claims no tax consequences occurred; therefore, the only way to avoid the tax consequences would seem to be to fit the new GPA-70 plan into a continuing annuity category for tax purposes. It is respectfully submitted that the Honorable District Court and the Honorable Court of Appeal overlooked this blatant inconsistency in defendant's claim that it converted all the old TSAP contracts to a completely new plan, the GPA-70.

The central issue where we feel the lower courts erred was the question of whether or not the insurance company did actually terminate the 396 TSAP plans written by agent Wright as agent for the insurance company. The most important factor in the consideration thereof is the fact that the insurance company advised the individual policy holders that no reportable tax consequences would result in converting the TSAP policy to the group professional annuity plans. This presentation by the company was contrary to Section 401 of the Internal Revenue Code in its interpretation at that time. If the old TSAP contracts were not terminated under Section 401 then they should not be considered terminated under the agency contract between the insurance company and the agent.

The most obvious affect and in deed, the best income producing plan for the insurance company was to cut off commissions to the selling agent, who had far exceeded any possible expected income as a result of his own initiative and foresight in developing and selling the TSAP contracts.

Question 2: "Under The Language Of The Agency Contract Between Insurance Agent And Insurance Company, Can The Insurance Company Avoid Its Obligation To Pay Renewal Commissions By Converting Individual Tax Sheltered Annuity Plans To Group Professional Annuity Plans?"

The litigation most nearly on point with the present facts is *Newcomb vs. Imperial Life Insurance Company*, 51 F. 725 (E. D. Mo., 1892). Therein the plaintiff-agent was granted an agency contract to sell insurance of a specified type with provisions made for renewal commissions even after termination. Of course, the agent was terminated. The company subsequently discontinued the type policy that the agent sold and instituted a different policy. The result was that the renewal commissions of the plaintiff-agent were stopped. The plaintiff-agent brought suit to recover his renewal commissions. The Court explained the covenant to pay renewal commissions even after termination as follows:

> This covenant must be held to imply that the company would make reasonable efforts to induce parties who had become insured through plaintiff's solicitation to renew their policies, and that it would also make reasonable efforts to collect the renewal premiums in which the plaintiff had an interest. At all events, the defendant had no right to interpose obstacles in the way of the renewal of such policies . . .
>
> The Court concludes that this portion of the pleadings shows a violation of the agreement such as would entitle the plaintiff to recover damages in some amount, even though it be

conceded that, under the contract, the defendant-company had the right to terminate the agent at its pleasure. Pages 728-29.

Plaintiff in the present litigation showed that his renewal commissions were cut off and dropped drastically after his termination. (Trial transcript 357-58) Plaintiff strongly relied upon the duty of the defendant set out in paragraph 6 (b) of his agency contract based on the legal interpretation of the similar agreement and similar facts as set forth in *Newcomb* above. The plaintiff undertook in good faith to secure the initial individual annuity contracts. He pioneered and developed the program in Louisiana virtually single handedly and worked diligently for the defendant-insurance company throughout his employment. It should not be overlooked that renewal commissions for individual annuity contracts magically turned into GPA-70 contracts are dutifully paid by defendant-company to agents still employed by Southwestern Insurance Company. (District Transcript 295, L. 12-19) It remains to be seen only the exact amount of the renewal commissions that are due plaintiff herein.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Writs has been served upon defendant, Southwestern Life Insurance Company, by mailing a copy of same in the United States mail, postage prepaid, to Mr. Lyman G. Hughes, 4200 Republic National Bank Tower, Dallas, Texas 75201.

Jonesboro, Louisiana, this the ____ day of September, 1976.

BOBBY L. CULPEPPER

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION
No. 17,451

ROBERT E. WRIGHT, SR.

versus

SOUTHWESTERN LIFE INSURANCE COMPANY

FOR PLAINTIFF
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Holloway, Baker, Culpepper
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Post Office Box E
Jonesboro, Louisiana 71251

FOR DEFENDANT
MESSRS.
David I. Garrett, Jr.
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and Hamaker
Post Office Box 2425
Monroe, Louisiana 71201

Lyman G. Hughes
Morris Harrell
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and Doke
Republic National Bank Tower
Dallas, Texas 75201

BEN C. DAWKINS, JR., SENIOR JUDGE

RULING ON MOTION TO DISMISS UNDER RULE 41(b), F. R. Civ. P.

By his complaint, Robert E. Wright, Sr. (Wright) brought this diversity action against Southwestern Life Insurance Company (Southwestern), for whom he formerly was a writing agent, for recovery of damages allegedly incurred when 396 tax-sheltered annuities plans (TSAP) written by Wright were converted to group professional annuities plans (GPA-70), thereby terminating many renewal commissions to which he claims he is entitled.

The action was tried without jury on November 4, 1974. At the close of plaintiff's case, we held that the remedy, if any, properly would not be an action for damages, but rather for an accounting. We thereupon ordered plaintiff to submit an amended complaint within fifteen days praying for an accounting. Further, we apprised Southwestern that the accounting would be due ninety days from the filing of plaintiff's amended complaint.

Defendant then orally moved for "directed verdict" on plaintiff's original complaint, which we properly must treat as a motion to dismiss pursuant to Rule 41(b), F. R. Civ. P.[1] *Federal Insurance Company v. Hardy*, 222 F. Supp. 68 (D. C. Mo., 1963).

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1 "* * * After plaintiff, in an action tried by the Court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). * * *"

We now hold that plaintiff's original action is dismissed with prejudice; and, accordingly, enter the following findings of fact and conclusions of law pursuant to Rule 52(a), F. R. Civ. P.

FINDINGS OF FACT

Plaintiff's association with Southwestern began on October 10, 1955, when he was employed to canvass for applications for life insurance. Physical injuries soon limited Wright's ability to engage in daily canvassing and servicing of clients. However, following passage by Congress of the Technical Amendments Act of 1958, plaintiff became acutely interested in the then new TSAP program.

Considerable personal effort expended by Wright resulted in Southwestern's obtaining TSAP franchises among ten institutions of higher learning and educational bodies in Louisiana.[2] Plaintiff sold TSAP's to persons employed in these institutions and regularly serviced their annuity plan needs until April 17, 1968, at which time his agency contract was terminated by Southwestern in accord with the provisions of that agreement.[3]

Absent cancellation or conversion of the policies, plaintiff normally would have received renewal com-

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2 These institutions are Northeast Louisiana State College, Northwestern Louisiana State College, Nichols State College, McNeese State College, Southeast Louisiana State College, Louisiana Polytechnic Institute, Grambling College, Southern University, Lincoln Parish School Board, and Southern State College.

3 In the wake of his dismissal, Wright brought an action for damages against Southwestern which we dismissed at 364 F. Supp. 981, affirmed (5th Cir.) 485 F. 2d 1238.

missions for a period of ten years on each TSAP written by him. However, virtually all of his former TSAP clients converted to newly developed GPA-70 plans, thereby terminating plaintiff's renewal commissions.

Wright argues that Southwestern initiated and offered GPA-70 plans to TSAP policy holders in a bad-faith effort to defeat his receiving income from renewal commissions.

We disagree. Evidence adduced at trial clearly shows that Southwestern fashioned the GPA-70 plan not to hurt Wright but to maintain its competitive stature in a nationwide insurance market concerned with the advent of ever-improving plans to be offered to the public. There is not a scintilla of evidence in the record to prove that defendant was motivated in any way by ill will toward plaintiff in devising and offering the GPA-70 program.

Moreover, undisputed testimony elicited from many GPA-70 conversion policy holders shows that they were in no way compelled to convert to GPA-70. Rather, every client was presented with the alternative merits of both plans, thereby creating a climate for intelligent decision whether to convert from TSAP to GPA-70. Thus those policy holders electing to convert did so with their "eyes wide open."

CONCLUSIONS OF LAW

No authority has been brought to our attention, nor do we know of any, which recognizes a vested right in an insurance agent to receive renewal commissions

notwithstanding good-faith cancellation or conversion of a policy of insurance. An insurance agent is not a third party beneficiary under a contract of insurance, nor is he privy thereto. *Sterling Colorado Agency, Inc., v. Sterling Insurance Company*, 266 F. 2d 472 (10th Cir., 1959).

While we recognize that an insurer may not cancel a policy arbitrarily in order to terminate an agent's renewal premiums, *Newcomb v. Imperial Life Insurance Company*, 51 F. 725 (C. C. Mo., 1892), nor so act out of malice toward an agent, evidence has shown Southwestern to be motivated only by a desire to remain competitive and to provide responsible insurance service to its policy holders.

Accordingly, we conclude that plaintiff not only has failed to carry his burden of proof; indeed all of the evidence is against his claims.

Therefore, plaintiff's action is dismissed with prejudice.

* * * *

RULING ON OPPOSITION TO ACCOUNTING MENTIONED SUPRA

Pursuant to our order of November 6, 1974, mentioned *supra*, plaintiff filed an amended complaint on November 18, 1974, praying for an accounting. Defendant's accounting was filed March 11, 1975, whereupon plaintiff filed an opposition challenging the sufficiency of the accounting and praying further that an independent auditor be appointed special master for the

purpose of reviewing the accuracy of defendant's accounting. On April 10, 1975, we ruled that plaintiff's opposition was merely a "scatter-shot" attack and ordered plaintiff to file a supplemental opposition stating with particularity the objections to defendant's accounting. The supplemental opposition and brief in support thereof were filed April 25, 1975. Defendant's response thereto was filed with supporting brief on May 12, 1975.

By motion filed October 17, 1975, defendant moves for summary judgment dismissing plaintiff's amended complaint.

Plaintiff has offered no evidence to dispute the accuracy of defendant's accounting, rather he continues to assert that he was wronged by the conversion of annuity plans previously written by him. That argument has been rejected by our ruling on plaintiff's original demand, *supra*.

Inasmuch as we perceive no genuine factual dispute as to the accuracy of defendant's accounting, and noting that the accounting reflects no money due plaintiff from Southwestern, we hold that plaintiff is due no relief.

Moreover, recognizing that "reference to a master shall be the exception and not the rule," Rule 54(b), F. R. Civ. P., we decline to refer this to a master upon plaintiff's totally unsupported objections to defendant's accounting.

Accordingly, defendant's motion for summary judgment on plaintiff's amended complaint is granted.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 14th day of November, 1975.

/s/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

[Filed: Nov. 14, 1975]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1092
Summary Calendar*

ROBERT E. WRIGHT, SR.,
Plaintiff-Appellant,

versus

SOUTHWESTERN LIFE INSURANCE
COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

(July 14, 1976)

Before BROWN, Chief Judge, MORGAN and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1092

ROBERT E. WRIGHT, SR.,
Plaintiff-Appellant,

versus

SOUTHWESTERN LIFE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(AUGUST 18, 1976)

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Before BROWN, Chief Judge, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.